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No. 90-1757

In The

Supreme Court of the United States

October Term, 1990

ALBERT RUSSO AND ANNE RUSSO,

Petitioners,

v.

MASON-McDUFFIE INVESTMENT CO.,
a dissolved California corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a plaintiff bring a civil RICO claim more than five years after discovering both his injury and the existence of a pattern of racketeering activity?

LIST OF PARTIES

The following persons and entities were parties before the United States Court of Appeals for the Ninth Circuit.

1. Albert and Anne Russo, appellants below and petitioners in this Court; and

2. Mason-McDuffie Investment Co., appellee below and respondent in this Court. Mason-McDuffie Investment Co. is a dissolved corporation. Before its dissolution in 1982, Mason-McDuffie Investment Co. was wholly owned by Mason-McDuffie Co., a partnership.

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RESPONDENT'S BRIEF IN OPPOSITION

Mason-McDuffie Investment Co., Respondent, respectfully submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, filed May 15, 1991, by Albert and Anne Russo, Petitioners.

JURISDICTION

Jurisdiction is based upon 28 U.S.C section 1254(1).

STATEMENT OF THE CASE

A. Nature of the Case

1. Russo's Allegations

On March 1, 1989, petitioners Albert and Anne Russo ("Russo") filed this lawsuit. The action arises from events that occurred in 1981-83.[1]

In early July of 1981, Russo pledged certain real property as collateral for an $844,000 loan by State Savings and Loan Association ("State Savings") to Equity Development Company ("Equity"), a real estate developer. Equity used the loan proceeds as a down payment for the purchase and development of a project known as Saratoga Square in San Jose, California. Equity planned to construct the proposed project with the proceeds of a separate construction loan from State Savings. In return for putting up his property as collateral, Russo was to receive four condominium units plus $15,000, for a total projected return of approximately $555,000.

In 1982, Equity defaulted on its construction loan, and State Savings instituted foreclosure proceedings on Saratoga Square. Those proceedings concluded on May 23, 1983. Because the sale of the project satisfied the debt, Russo's property was released as collateral. However, according to Russo's complaint, the foreclosure on

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[1] This petition seeks review of an order of dismissal entered pursuant to Federal Rule of Civil Procedure 12(b)(6). Accordingly, for the purposes of this factual statement, Russo's allegations are taken as true.

Saratoga Square "wiped out any chance for recovery of profit for plaintiff Russo." ER 1, ¶ 111.[2]

According to Russo, his "injury occurred on May 23, 1983, the date [the] foreclosure was complete." Petition at 7. By October 30, 1983, Russo had discovered "the fraudulent character of the financing of the real estate project. . . . " *Id.* at 6. On that date, according to Russo's complaint, Russo "became aware of the fact that State's bust-out scheme had prevented plaintiffs from making their profit" on Saratoga Square. ER 1, ¶ 113.

2. Mason-McDuffie's Alleged Role

Mason-McDuffie Investment Co. ("Mason-McDuffie") had absolutely no contact with Russo. ER 1, ¶¶ 85-92. It did not solicit Russo's investment in Saratoga Square, nor did it otherwise participate in the transaction by which Russo pledged his property as security for Equity's loan.

Russo alleges only that Mason-McDuffie "participated" in other, unrelated transactions. *Id.*, ¶ 74.

B. Proceedings in the Courts Below

1. Russo I

On October 24, 1986, Russo filed his first federal court complaint (*"Russo I"*), alleging violations of the Racketeer Influenced and Corrupt Organizations Act

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[2] "ER" refers to the Excerpts of Record filed in the Court of Appeals for the Ninth Circuit.

("RICO") and various other claims.[3] The complaint named State Savings, Mason-McDuffie, and others as defendants. Russo alleged that the defendants had participated in a real estate "bust-out" scheme that prevented him from making his profit in Saratoga Square. On May 24, 1988, pursuant to Federal Rule of Civil Procedure 4(j), the district court dismissed *Russo I* for untimely service.

2. Russo II

On October 27, 1987, while the motion to dismiss for untimely service was pending in *Russo I*, Russo filed a second complaint in federal court (*"Russo II"*), again alleging RICO violations. However, Russo again failed to serve Mason-McDuffie within 120 days of filing. When this fact was called to his attention, Russo stipulated that Mason-McDuffie could be dismissed. On October 26, 1988, pursuant to stipulation, the court entered an appropriate order of dismissal.[4]

3. Russo III

On March 1, 1989, more than four months after the dismissal of Mason-McDuffie from *Russo II*, and more

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[3] The Petition incorrectly states that "[i]n October, 1983, when they learned they were victims of a scheme to defraud, the Russos filed suit." Petition at i. Russo did not file his first complaint until 1986.

[4] Russo subsequently amended his complaint in *Russo II*, dismissing all defendants except Mason-McDuffie. Upon realizing his error in dismissing the other defendants, Russo moved for leave to amend. The district court denied that motion, and Russo appealed. Ultimately, the parties settled, resulting in the voluntary dismissal of Russo's appeal.

than five years after he allegedly discovered the fraudulent "bust-out" scheme, Russo filed this action. Because *Russo II* continued against the other defendants, Russo named only Mason-McDuffie as a defendant in this action.

Mason-McDuffie moved to dismiss based on the applicable statutes of limitations. The district court (Judge William W Schwarzer, presiding) granted the motion and dismissed all claims with prejudice.

On appeal, the Ninth Circuit affirmed, ruling:

> [A]ppellant's RICO claim clearly falls outside the applicable four-year statute of limitations: appellants were injured on May 23, 1983, when the foreclosure proceedings on Saratoga Square were completed; they admit they became aware of the alleged fraudulent scheme no later than October 30, 1983; and appellants filed the case at bar more than five years after both of these dates.

Russo now brings this petition for writ of certiorari, urging the Court to reject the Ninth Circuit's "narrow illiberal" accrual rule in favor of a more expansive approach. However, because Russo's claims are clearly time-barred under any plausible rule of accrual, and because those claims do not merit a favorable exercise of this Court's discretion, Mason-McDuffie respectfully requests that the petition be denied.

ARGUMENT

A. Because Russo's RICO Claims Are Time-Barred Under Any Plausible Accrual Rule, His Case Is Not An Appropriate Vehicle For Review Of This Issue.

Russo asserts that his petition "offers a comprehensive vehicle to examine each of the relevant contours" of the accrual issue. Petition at 18. However, Russo's RICO claims remain time-barred under any viable rule of accrual. Because resolution of this question is not necessary to the determination of Russo's claim, this Court should defer its discretionary review until a case presents the accrual issue within a meaningful factual context.

In *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 156 (1987), this Court held that a four-year limitations period applies to RICO claims. However, because the RICO claims in that case clearly accrued within the four-year period, the Court "ha[d] no occasion to decide the appropriate time of accrual for a RICO claim." *Id.* at 156-57. The federal circuit courts have since had numerous occasions to consider the issue. While commentators have devised various taxonomies for categorizing the accrual rules applied,[5] recent case law

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[5] *See* Note, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990) (identifying the discovery rule, the separate accrual discovery rule, the last predicate act rule, the last predicate act discovery rule, and the Clayton Act rule); Note, *"Mother of Mercy, Is This The Beginning of RICO?": The Proper Point of Accrual of a Private Civil RICO Action*, 67 N.Y.U.L. Rev. 172 (1990) (identifying discovery rule, antitrust rule, last-act rule, last-act discovery rule, and last-injury discovery rule) [hereinafter *"RICO Accrual"*].

reveals two functional approaches: the "injury discovery" rule and the "pattern discovery" rule. Under either of these rules, Russo's RICO claims are untimely.

1. Because Russo Discovered His Injury In May Of 1983, His RICO Claims Are Time-Barred Under The "Injury Discovery" Rule.

Under the "discovery of the injury" approach followed by six circuits,[6] a civil RICO claim accrues when a plaintiff knows or has reason to know of the injury forming the basis for his claim. Clearly, this approach bars Russo's RICO claims.

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[6] *See Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990) (limitation period begins when "a plaintiff knows or should know of the injury which is the basis for the action"); *Rodriguez v. Banco Central*, 917 F.2d 664, 666 (1st Cir. 1990) (statute starts running "when a plaintiff knew or should have known of his injury"); *Hofstetter v. Fletcher*, 905 F.2d 897, 904 (6th Cir. 1988) ("the trial court correctly instructed the jury to determine whether plaintiff knew or should have known of the defendant's fraudulent scheme"); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988) ("each time a plaintiff suffers an injury . . . a cause of action to recover damages based on that injury accrues to plaintiff at the time he discovered or should have discovered the injury"), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethelehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) ("statutory period begins from when a plaintiff knows or should know of the injury that underlies his cause of action"); *LePorte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986) (limitations period begins when plaintiff "discovers, or, in the exercise of reasonable diligence, should have discovered, the alleged fraud"). *See also State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987).

Russo admits that he knew of his alleged injury in May of 1983, when State Savings foreclosed on the Saratoga Square property. Petition at 7. He filed his complaint in *Russo III* on March 1, 1989, almost six years after discovering the loss of his anticipated profits in Saratoga Square. Accordingly, the Ninth Circuit and the district court correctly held that Russo's claims were untimely under the "injury discovery" rule.[7]

2. Because Russo Knew In October Of 1983 That His Alleged Injury Was Part Of A Fraudulent Pattern, The "Pattern Discovery" Rule Bars His Claim.

Russo argues that the "narrow illiberal" rule applied by the Ninth Circuit is inconsistent with "Congress' mandate for the liberal construction of RICO." Petition at 21. However, even under the more expansive "discovery of the pattern" approach recently adopted by three federal circuits,[8] Russo's claims are similarly barred.

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[7] If Russo had timely served his first suit against Mason-McDuffie, which he filed in October 1986, his RICO claim would have been timely under the "injury discovery" rule.

[8] *See Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991) ("[W]ith respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern."); *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817, 820 (10th Cir. 1990) (same); *Bivens Gardens Office Bldg., Inc. v. Barrett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990) (same), *cert. denied*, 111 S. Ct. 1695 (1991).

Under the "pattern discovery" rule, "a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." *Granite Falls Bank*, 924 F.2d at 154. Here, Russo admits that, by October 30, 1983, he had discovered the fraudulent "bust-out" scheme. Petition at 6; ER 1, ¶ 113. Nonetheless, Russo did not file the complaint at issue here until 1989, more than five years later.[9] Accordingly, even under the "pattern discovery" rule, Russo's RICO claims are barred by the statute of limitations.[10]

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[9] If Russo had timely served either *Russo I* or *Russo II*, his RICO claims might have been timely under the "pattern discovery" rule.

[10] Russo has suggested a third possible approach, but that approach lacks plausibility because it ignores the logic of this Court's decision in *Malley-Duff*. Russo suggests that the limitations period should commence only upon "the end of the unlawful conduct of the perpetrator . . . . " Petition at ii. Only one court of appeals supports this view. In *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988), the Third Circuit stated that in "multiple injury, multiple victim" cases, the limitations period begins to run when plaintiff knows or should know that an act causing injury is part of a pattern of racketeering, "unless, as part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity." Courts and commentators have consistently criticized *Keystone*, particularly its focus on the "last predicate act." *See, e.g., Granite Falls Bank*, 924 F.2d at 154 (adopting pattern-discovery rule, which "better reflects the underlying policy of a statute of limitations requiring

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3. Because Russo's RICO Claims Are Untimely Under Any Rule Of Accrual, The Resolution Of This Question Is Irrelevant To The Outcome Of Russo's Case.

In sum, no plausible accrual rule – however "liberal" – will save Russo's RICO claims from untimeliness. That untimeliness was caused, not by any "sophisticated course of criminal conduct" on the part of Mason-McDuffie, but by Russo's own failure to perfect timely service in his first two RICO actions. In cases such as this, where the resolution of an admitted conflict between the circuits would have no effect on the result below, denial of certiorari is appropriate. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari as improvidently granted).

Tacitly admitting the factual weaknesses in his own case, Russo seeks to re-cast his claims in terms of the

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diligence on the part of the plaintiff than does the seemingly more open-ended rule fashioned by the Third Circuit in *Keystone*"); *RICO Accrual, supra* note 5, at 223 (noting that Keystone's last-act discovery rule "can extend the statute of limitations indefinitely, contravening the principles underlying the limitation of actions and providing a wind-fall time-period to the plaintiff within which to bring her suit"). By focusing on the "last predicate act," the *Keystone* approach essentially ignores this Court's admonition in *Malley-Duff* that "[a] federal cause of action brought at any distance of time would be utterly repugnant to the genius of our laws." 483 U.S. at 156 (citations omitted).

greater social welfare. In this vein, Russo argues that his case is relevant to the current savings and loan crisis, that the Ninth Circuit's "narrow illiberal" approach to accrual "could not come at a more inopportune time" for the victims of that crisis, and that this question is therefore an "important and recurring" issue affecting "a considerable number of suits." Petition at 18-21, 25-26. Undoubtedly, one of those suits will present a meaningful factual context for deciding the accrual issue. This case does not.

B. Equitable Concerns Weigh Against This Court's Grant Of Discretionary Review

Beyond the irrelevance of the accrual issue to the ultimate outcome of this lawsuit, there are several equitable reasons why the Court should not exercise its "sound judicial discretion" in Russo's favor.

First, Russo alleges no real, "out-of-pocket" injury. He recovered the property that he had pledged as collateral. His claim relates only to alleged lost "profits."

Second, Mason-McDuffie had no role in soliciting Russo's investment in the "bust-out scheme." According to Russo, State Savings and Equity contacted him initially, procured his investment in Saratoga Square, and promised him profits from the project. ER 1, ¶¶ 104 and 108. Mason-McDuffie was not involved in that process. Thus, Russo's claims against Mason-McDuffie are, in a sense, "peripheral." Moreover, having dissolved in 1982, Mason-McDuffie did not engage in any further business, much less commit any further "predicate acts."

Third, Russo has had his "day in court," at least with respect to the numerous other defendants in *Russo II*. Russo took *Russo II* to the Ninth Circuit Court of Appeals, ultimately dismissing his appeal after settling the case.

Finally, Russo's certiorari petition arises solely because of his failure to perfect timely service in *Russo I* and *Russo II*. There is no reason for this Court to exercise its discretion favorably on behalf of a litigant who has consistently demonstrated such a lack of diligence.

CONCLUSION

For these reasons, Mason-McDuffie respectfully urges the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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